Supreme Court, U. S.
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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 76-1453

GORDON O'BRIEN,
Petitioner,

v.

FRANK A. HALL,
Respondent

PETITIONER'S REPLY BRIEF

Francis J. Dimento
Dimento & Sullivan
100 State Street
Boston, Mass. 02109

Of Counsel:
Daniel F. Featherston, Jr.
Seven Water Street
Boston, Mass. 02109

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Several factual errors in respondent's brief in opposition mandate correction, as they may lead the Court to conclude that the factual basis of the case is too blurred to present in sufficient starkness the constitutional issues raised. No legal rejoinder is necessitated by respondent's brief.

Respondent maintains (p. 5) that ". . .O'Brien remained in Block 10 by his own choice after February 20, 1976, when the Commissioner offered to move him to a far less restrictive general population housing area in MCI Walpole." That misrepresents the facts, as the respondent well knows, and yet it is routinely proffered in his Statement of the Case. In

making this correction, and the others below, petitioner will, of course, restrict himself to matters of record in the court below, a discipline wildly abandoned in respondent's brief, as is noted further herein.

Prior to the extensive hearings culminating in the district court's Order of April 28, 1976, granting the preliminary injunction, the court had entered a temporary restraining order to enjoin respondent "from continuing the confinement of the [petitioner] in segregation in 'Ten Block' . . ." in a Ruling and Order dated February 19, 1976. (Reference to this stage of the proceedings had not before seemed relevant.) One part of that Order said:

> "As to plaintiff's possible transfer to the general prisoner population at M. C. I. Walpole, the plaintiff himself testified that because of the disciplinary reports filed against him, his life would be in danger if he is confined with the general prisoner population at Walpole. On the present state of the evidence I find that this is probably true."

The court refused to return petitioner to Bridgewater, as he asked, but ordered his release from Ten Block and his transfer to the, so-called B Side at Walpole. The court did not appreciate the fact that B Side confinement was, as the respondent says, part of the "general population housing area in MCI Walpole." The respondent and his agents well knew, however,

and that simple compliance with the court's mistaken order amounted in all probability to the execution of a death sentence on petitioner, given the jungle code obtaining. Yet the very next day, February 20, 1976, respondent's agents came to petitioner's Ten Block cell to take him to B Side. He refused. Court approval was obtained for him to remain in Ten Block, with the preliminary injunction hearings scheduled to begin in two weeks. When the court came to understand the situation after those more extensive hearings the injunctive relief specified petitioner's transfer to some general population out of Walpole entirely -- anywhere else (except still not back to Bridgewater). (That relief was then stayed pending appeal, as noted in the petition, and petitioner remained in Ten Block approximately six months more -- more than a year total.)

Those are the facts. It is not only a misrepresentation, but a macabre joke, for the respondent to say that "O'Brien remained in Block 10 by his own choice after February 20, 1976 . . ." That was still five months after his transfer, of course, and the relief here sought still viable, but petitioner did not want the Court to gain the impression that some element of voluntariness, waiver, or whatever, lurked in the record here to tip the scales against granting the writ or require an eventual order that certiorari had been improvidently granted.

Next, the respondent presents as facts (ps. 4-5) a detailed comparison of Ten Block conditions and those in the Walpole, so-called, "isolation" cells, to support part of his Statement of the Case that the petitioner "was not placed in 'solitary', . . ."

because "the Massachusetts term for 'solitary'" is, he says, "isolation", which, he also says, petitioner "acknowledges." Petitioner, of course, does not so acknowledge at all, but argues in his petition (ps. 17-21) that for constitutional purposes Ten Block is "solitary," and he relies on that argument. The "facts" propounded by the respondent contrasting the Eden of Ten Block with what he says is "solitary" appear nowhere in the record of this case. They are fabrications of his own perceptions, nothing more. Nowhere is there any record reference to permit even an inference of one of those "facts." Nowhere, of course, is there any support for his "fact" that only what Massachusetts calls "isolation" is "solitary" -- nor could there be. No one has made that equation, and no one but this Court can, within the parameters of the constitutional question here presented. It was because there was no record authority for a description of the conditions in Ten Block (let alone contrasting them with the "isolation" cells) that petitioner in his petition (p. 18) had to refer the Court to the "restrained description" in Daigle v. Hall, 387 F. Supp. 652 (Mass. 1975). That seemed the only responsible thing to do. It still does. Interestingly, however, even the respondent (p. 4) says that Ten Block confinement "segregated [petitioner] from the rest of the prison population." That alone would be sufficient for the courts cited on pages 19 and 20 of the petition to amount to "solitary" for constitutional purposes. But only this Court may decide.

Respondent is also wrong in saying (p. 10) that the First Circuit has already held in two cases that the regulations here alternatively relied on by petitioner do not create "rights rooted in state law"

sufficient to invoke due process. Petitioner took pains to obviate any such misreading of those cases, saying in his petition (p. 27):

> ". . . Note well that these disciplinary regulations are not the reclassification regulations the Court assessed in Meachum, which were the same regulations this lower court also found not to constitute a substantive right in Four Unnamed and Lombardo, supra." (Emphasis supplied.)

A reading of the cases will easily demonstrate that petitioner is correct. Words mean what respondent says they mean only in the Massachusetts Department of Correction.

The next to last sentence in respondent's brief (p. 11) contains the last in this litany of factual errors. The time limits for permissible segregation without a hearing relied on by petitioner and contained in the effective regulations are not just for "minor" matters, but apply to the "major" matters with which petitioner was charged. A reading of them (ps. 52-56 of Appendix to Petition) will so demonstrate.

The facts are thus corrected.

Respectfully submitted,

Of Counsel:
Daniel F. Featherston, Jr.
7 Water Street
Boston, Mass. 02109

Francis J. Dimento
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100 State Street
Boston, Mass. 02109